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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 442

WILLIAM CHAE-SIK LEE AND GRACE KOOM SOON LEE,
PETITIONERS

v.

ROBERT F. KENNEDY,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-25) is reported at 294 F. 2d 231.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1961. The petition for a writ of certiorari was filed on September 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a court, in affirming an administrative decision which does not involve a determination either of factual issues or of administrative policy, may rest its decision upon legal grounds differing slightly from those of the administrative agency.

2. Whether it was proper to apply to petitioners the statutory requirement that an exchange visitor return to his own country for a period of two years before being admitted for permanent residence in the United States.

STATUTES AND REGULATIONS INVOLVED

1. Section 2 of the United States Information and Educational Exchange Act of 1948, 62 Stat. 6, 22 U.S.C. 1431, provides in pertinent part:

> The Congress declares that the objectives of this chapter are to enable the Government of the United States to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries. Among the means to be used in achieving these objectives are—
>
> * * * *
>
> (2) an educational exchange service to cooperate with other nations in—
>
> (a) the interchange of persons, knowledge, and skills;
>
> (b) the rendering of technical and other services;

(c) the interchange of developments in the field of education, the arts, and sciences.

2. Section 201 of the Act, 62 Stat. 7, 22 U.S.C. 1446(a), provides (as it appears in the United States Code):

> The Secretary [of State] is authorized to provide for interchanges on a reciprocal basis between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill and shall wherever possible provide these interchanges by using the services of existing reputable agencies which are successfully engaged in such activity. The Secretary may provide for orientation courses and other appropriate services for such persons from other countries upon their arrival in the United States, and for such persons going to other countries from the United States. When any country fails or refuses to cooperate in such program on a basis of reciprocity the Secretary shall terminate or limit such program, with respect to such country, to the extent he deems to be advisable in the interests of the United States. The persons specified in this section shall be admitted as nonimmigrants under section 1101(a)(15) of Title 8, for such time and under such conditions as may be prescribed by regulations promulgated by the Secretary of State and the Attorney General. A person admitted under this section who fails to maintain the status under which he was admitted or who fails to depart from the United States at the expiration of the time for which he was admitted, or who engages in activities of a political nature detrimental to the interests of the United States, or in activities

not consistent with the security of the United States, shall, upon the warrant of the Attorney General, be taken into custody and promptly deported pursuant to sections 1251-1253 of Title 8. Deportation proceedings under this section shall be summary and the findings of the Attorney General as to matters of fact shall be conclusive. Such persons shall not be eligible for suspension of deportation under section 1254 of Title 8.

3. The Immigration and Nationality Act of 1952 amended Section 201 of the Exchange Act, *supra*, p. 3, to make its statutory references conform to the new provisions of the Immigration and Nationality Act (66 Stat. 276-277). It also provided, by Section 245 (8 U.S.C. 1255), as follows:

(a) The status of an alien who was lawfully admitted to the United States as a bona fide nonimmigrant and who is continuing to maintain that status may be adjusted by the Attorney General in his discretion (under such regulations as he may prescribe to insure the application of this paragraph solely to the cases of aliens who entered the United States in good faith as nonimmigrants) to that of an alien lawfully admitted for permanent residence as a quota immigrant or as a nonquota immigrant under section 101(a)(27)(A), if (1) the alien makes application for adjustment, (2) the alien is admissible to the United States for permanent residence under this Act, (3) a quota or nonquota immigrant visa was immediately available to him at the time of his application for adjustment, (4) a quota or nonquota immigrant visa is immediately available to him at the time his

application is approved, and (5) if claiming a nonquota status under section 101(a)(27)(A) he has been in the United States for at least one year prior to acquiring that status. A quota immigrant visa shall be considered immediately available for the purposes of this subsection only if the portion of the quota to which the alien is chargeable is undersubscribed by applicants registered on a consular waiting list. Any alien who shall file an application for adjustment of his status under this section shall thereby terminate his nonimmigrant status.

(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year current at the time such adjustment is made.

* * * *

4. Following enactment of the Immigration and Nationality Act of 1952, regulations were promulgated on December 18, 1952. Section 214j.4 of 8 C.F.R. (17 F.R. 11495) provides as follows:

> A nonimmigrant of the class described in this part shall be admitted on the condition that he agrees not to apply for a change of the nonimmigrant status under which he is admitted to any other class or classes of nonimmigrant pursuant to section 248 of the act, or adjustment of status to that of a permanent resident pursuant to section 245 of the Act * * *.

5. On June 4, 1956, Section 201 of the United States Information and Educational Exchange Act of 1948, *supra*, p. 3, was further amended by the addition of another paragraph, 70 Stat. 241, 22 U.S.C. 1446(b), which provides as follows:

> No person admitted as an exchange visitor under this section or acquiring exchange visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 1101(a)(15)(H) of Title 8, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States: *Provided*, That upon request of an interested Government agency and the recommendation of the Secretary of State, the Attorney General may waive such two-year period of residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: *And provided further*, That the provisions of this subsection shall apply only to those persons acquiring exchange visitor status subsequent to June 4, 1956.

6. Section 245.1 of 8 C.F.R. (24 F.R. 1375) provides in pertinent part (amendment of February 18, 1959):

> * * * No alien who has had the status of an exchange alien in the United States may apply for adjustment of status unless pursuant to section 201(b) of the United States Information and Educational Exchange Act of 1948, as

amended, he has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States or the Secretary of State has recommended that the two-year period be waived.

STATEMENT

Petitioners, who are Korean nationals, filed an action in the United States District Court for the District of Columbia for a declaratory judgment and review of the refusal by the Attorney General to adjust their status from that of exchange visitors to permanent residents (J.A. 2-5).[1] On the motions of both parties for summary judgment,[2] the court gave judgment for defendant (Pet. App. 27). The court of appeals affirmed, Judge Wilbur K. Miller dissenting without opinion (Pet. App. 21-26). The facts may be summarized as follows:

1. Petitioner William Chae-Sik Lee, a Korean doctor, was admitted to this country on November 15, 1953, as a non-immigrant student, for the purpose of attending the Dallas Theological Seminary.[3] In

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[1] "J.A." refers to the joint appendix in the court of appeals filed in this Court. "R." refers to the record in the district court, lodged with the Court. "Exh. A" and "Exh. B" are government exhibits filed with the district court and contain the pertinent records of the Immigration and Naturalization Service relating to petitioner William Lee and petitioner Grace Lee, respectively.

[2] Petitioners' cross motion for summary judgment stated, "There exists no factual issue and plaintiffs are entitled to summary judgment as a matter of law."

[3] This petitioner's Temporary Entry Permit gave as his intended length of stay four years and included the fol-

April 21, 1954, while he was a student at that institution, he inquired of the Immigration and Naturalization Service at Dallas whether he could accept an internship at the United Hospital of Port Chester, New York. On April 23, the Service replied that inasmuch as he had entered as a student to attend the Dallas institution he would not be eligible to take the suggested employment without a change of status. If he desired to apply therefor and presented bona fide reasons, he should do so by a form which was enclosed (J.A. 11). On May 27, 1954, the Service acknowledged receipt of petitioner's application for change of his non-immigrant status and requested that he obtain additional documents and attend a hearing on June 8, 1954 (J.A. 12). Following the hearing, which was not reported, petitioner was notified on June 18 that his change of status was approved. He was told (Exh. A 63):

> We are returning herewith your Korean passport and the Form I-94 which has been executed to show your present status in the United States and your admission until June 15, 1955.

Petitioner was instructed that the change was conditioned on his maintaining the status of an exchange visitor under the program at the Port Chester Hospital, and that if he wished to change to another approved program he should obtain advance permission to do so.

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lowing (J.A. 9): "The holder agrees to: (1) Depart from the United States at the expiration of stay authorized by the U. S. Immigration and Naturalization Service; (2) Abide by the terms and conditions of his admission and (3) Surrender this document at time of departure."

On May 13, 1955, the petitioner was released by the Port Chester Hospital to accept an internship at a hospital in Orange County, California (Exh. 61-62). On May 24, 1955, he applied for an extension of his temporary stay, stating that he did not intend to abandon his residence in Seoul, Korea. This extension was granted (Exh. A. 60).

On December 30, 1955, Dr. Lee was married to petitioner Grace Koom-Soon Lee (Exh. B 18), who had been admitted as a non-immigrant student from Korea in 1954 (Exh. B 20). On December 23, 1957, following the birth of a child, Mrs. Lee was granted a change of status and extension of stay to conform to that of her husband (Exh. B 14). Her status turns upon that of her husband (Pet. 8).

On June 11, 1956, Dr. Lee (hereinafter referred to as "petitioner") was accepted for graduate medical training in anesthesiology at Lloyd Noland Hospital, in Fairfield, Alabama (Exh. A 58). On October 12, 1956, he wrote to the Immigration and Naturalization Service at Atlanta, requesting an extension of his temporary stay. On October 23, 1956, the Service returned petitioner's application, informing him that present law and regulations provided that exchange visitors admitted to the United States after June 4, 1956, or who otherwise acquired such status after that date, and exchange visitors granted extensions of temporary stay after September 21, 1956, were ineligible to have their status changed to that of permanent resident without returning either to their own country, or to another country cooperating in the exchange program, for a period of two years.

Accordingly, petitioner's application was returned to him with the information that it might be resubmitted if he signed at the bottom of the notifying letter his acknowledgment that he had been informed of this condition. If he did not desire to resubmit his application, it would be necessary for him to leave the United States at the termination of his present extension. Petitioner signed the acknowledgment and returned the application on November 20, 1956 (Exh. A 55). A new extension was then granted to June 30, 1957 (Exh. A. 35), and thereafter a further extension to terminate on December 30, 1958 (Exh. A 37).

On June 25, 1957, petitioner was released by the Lloyd Noland Hospital to attend the University of Minnesota for the purpose of majoring in anesthesiology (Exh. A 49).

2. On June 27, 1957, petitioner wrote to the Immigration and Naturalization Service, at St. Paul, stating that he wished to become a permanent resident of the United States and to apply for a waiver of the two-year absence requirement. He said (Exh. A 40):

> I am aware that I should leave the United States if my application is denied. In case this happens, I will apply for an immigration visa after two years stay in my home country.

Following the forwarding of his application by the District Director, the Department of State answered on August 22, 1958 (Exh. A 25-26):

> The Department is unable to consider favorably recommending the granting of a waiver on the ground that an exchange visitor's services

> are required in the United States unless a request is received from an interested United States Government agency showing that the exchange-visitor's ineligibility for permanent resident status is clearly detrimental to a program or activity of official interest to such agency. No such request has been received in Dr. Lee's case. Additionally, the Department wishes to point out that the Korean government has expressed to the Department the need of American-trained physicians in Korea. In this connection, it is pointed out that the Korean exchange visitors are granted permission by their Government to come to the United States only on the understanding that they will study subjects which they can utilize in Korea and on the understanding that they will return to Korea at the termination of their training in this country.

On August 28, 1958, petitioner's application for a waiver was denied. He was notified that if he applied for an extension of his stay until June 30, 1959, and made necessary arrangements as to his Korean passport and his travel reservations, the extension would be granted (Exh. A 23-24). On April 24, 1959, petitioner was notified that he should leave the country by June 30, 1959 (Exh. A 20).

On August 5, 1959, petitioner's counsel submitted to the Immigration and Naturalization Service, at Duluth, a letter from the Hibbing General Hospital, of Hibbing, Minnesota, stating the hospital's need for an anesthesiologist, that petitioner was the only qualified person willing to accept the position, and that he would be the only anesthesiologist in the congressional

district outside Duluth. It was requested that petitioner be given a first preference status under the immigration quota (Exh. A 19, 8-9). The Service returned the request to petitioner's counsel, stating that petitioner was ineligible until he had fulfilled the requirement of two years residence in his home country or another cooperating country (Exh. A 18). Counsel then requested that the "petition" of the hospital be "adjudicated notwithstanding that the beneficiary, according to the present regulations of the Service, may not be eligible for adjudication of his status under section 245 of the Act", and inquired if the Director's ruling was subject to appeal (Exh. A 17). On August 18, the Service wrote counsel that, although petitioner was presently ineligible for adjudication of status because of noncompliance with the two-year absence requirement, if counsel wished to resubmit the "petition for first preference status" it would be adjudicated (Exh. A 16). Counsel did so, explaining that he wished to exhaust his administrative remedies (Exh. A 5), and the Service approved the petition on August 28, 1959 (Exh. A 4).

Counsel wrote the Service on September 22, 1959, that by reason of such approval petitioner was eligible for preference quota status and that petitioner believed he was admissible for permanent residence because he acquired the status of exchange visitor prior to the effective date of the 1956 statute establishing the two-year absence requirement (Exh. A 2). On September 30, 1959, the Service wrote to petitioner's counsel that the application was rejected because of noncompliance with the two-year absence require-

ment, citing 8 C.F.R. 245, but not referring to Section 201 of the Exchange Act, as amended in 1956 (Exh. A 1).

On October 6, 1959, petitioner filed the present action for review (J.A. 2-5).

ARGUMENT

1. Petitioner's primary argument stresses that the letter of the Immigration and Naturalization Service to petitioner, dated September 30, 1959 (*supra*, pp. 12-13), based the denial of petitioner's application for a change of status upon the regulation (8 C.F.R. 245.1, *supra*, pp. 6-7), whereas the court of appeals based its holding on the statute (Section 201, *supra*, pp. 3-4, as amended, p. 6). The claim is that the statute and the regulation differ significantly, and that in such a situation, where the administrative agency places its ruling on the regulation but not the statute, the reviewing court cannot affirm on the basis of the statute alone but must remand to the agency. Here, as the court of appeals pointed out (Pet. App. 25), both the statute and the regulation provide essentially the same rule, *i.e.*, that the two-year absence requirement applies to exchange visitors whose stay is extended after June 4, 1956. However, there is no real substance to petitioner's contention even if the statute and regulation are viewed as differing materially.

The principle that the reviewing courts will not venture into the administrative field to make determinations of policy or findings of fact, which the

administrative agency alone is empowered to make,' has no application where the only issue is a purely legal one and there are no factual issues left unresolved. *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263; *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 91. In this case, there was no question of fact, as petitioners expressly acknowledged in their cross motion for summary judgment (see *supra*, p. 7, note 2), and the dispositive issue is a statutory one. The case can wholly turn upon the interpretation to be placed upon the 1956 amendment to the Exchange Act, a pure legal question which the courts are fully competent to decide. As was pointed out in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88, where no determination of fact or of administrative policy is involved, it would be folly to send a case back to have a ruling or judgment reinstated upon another ground within the power of the appellate court to formulate and prescribe.

2. Secondarily, petitioners urge that, if it be determined that the court of appeals acted within its reviewing power, it misconstrued the statute. This position is not tenable in view of the history and pattern of the legislation, and in any event is not a question of sufficient general importance for this Court to consider.

The United States Information and Educational Exchange Act of 1948 stated that its purpose was

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[1] See *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80.

"to increase mutual understanding between the people of the United States and the people of other countries" by the "interchange of persons, knowledge, and skills". Section 201 of the Act provided for the interchange with other countries of students, teachers and persons with specialized skills, to enter as non-immigrant visitors for business, for such time and under such conditions as might be prescribed by regulations promulgated by the Secretary of State and the Attorney General (*supra*, pp. 3-4).

While the Exchange Act was not an immigration measure, Section 201 necessarily had to be correlated with immigration policy and was therefore re-examined in the studies preliminary to the Immigration and Nationality Act of 1952. In reporting the first draft of this bill in 1950, the Senate Judiciary Committee stated that the testimony before the committee was almost unanimous that persons entering under the exchange program should carry out its purpose by returning to their native countries, and should not remain in this country as permanent residents. The report (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 493) mentioned that this was shown by the provisions of Section 201 of the Exchange Act itself. The only amendments suggested for that section were to bring up to date its references to other statutes. The Immigration and Nationality Act, in Section 245 (8 U.S.C. 1255), also enacted a general provision permitting non-immigrants to adjust their status to that of permanent residents without having to undergo deportation proceedings. That it was not intended that this should apply to exchange visitors

was shown when the bill was reported to the Senate:[5]

> (A)pplicants for exchange visitor visas formally agree to return to their own country as a condition of their admission as exchange visitors and * * * the Department of State seeks to enforce their return as a matter of policy * * *.

The 1956 amendment to the Exchange Act (*supra*, p. 6) was intended to strengthen and support this policy of returning exchange visitors to their native lands, rather than to encourage their remaining here where their specialized skills opened up opportunities in this country superior to those which would be available if they went home. Exchange visitors had discovered a way to avoid the restriction placed upon them by going to Canada or Mexico and re-entering from there under their country's quota. In order to plug this loophole, an amendment to Section 201 was passed on June 4, 1956, making exchange visitors ineligible either for immigrant visas or for adjustment of their status unless they first returned to their native countries, or to another country cooperating in the program, for a period of two years. *Supra*, p. 6.[6] The purpose of the provision, as explained

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[5] S. Rep. No. 1608, 84th Cong. 2d Sess., p. 4. No House Report was submitted on this phase of the legislation. The Senate bill was passed in lieu of the House bill. U. S. Code Cong. and Admin. News, 1956, Vol. 2 2662, 2665.

[6] Representative Walter of Pennsylvania, co-author of the Immigration and Nationality Act of 1952, stated that the Department of State had reported that as many as sixteen foreign countries had indicated an intention to withdraw from the program if the United States continued to keep the best trainees for its own use. 105 Cong. Rec. 1952-53 (February 5, 1959).

in Senate Report No. 1608, 84th Cong. 2nd Sess., pp. 2-3, was to make it "perfectly clear to all concerned—Federal agencies, American individuals or organizations interested in the permanent sojourn of exchange visitors, the American public and, above all, the foreign nationals themselves—that the exchange program is not an immigration program and should not be used to circumvent the operation of the immigration laws." The reasons for the proviso upon which petitioners rely and its non-applicability to exchange visitors who thereafter might receive extensions of their temporary stay, were fully explained (*id.* 3-4):

> The committee was also concerned that S. 2562 as introduced might have been construed as applying not only to future exchange visitors but to those individuals who may have acquired exchange-visitor status prior to the enactment of the measure. It was felt that to attach a requirement of 2 years' waiting period after an exchange visitor has left the United States would be to impose a condition with respect to those now in the country which was not applicable at the time they accepted exchange-visitor status and which might have induced them to refuse it.
>
> Accordingly, to make clear that the measure was not intended to be retroactive, the committee voted to add an additional proviso, immediately after the words "public interest" ending the last sentence of the bill as introduced, in the following form:
>
> > *And provided further*, That the provisions of this paragraph shall apply only to those persons acquiring exchange-visitor status

> subsequent to the date of the enactment hereof.
>
> It should be emphasized, however, that the proviso is not intended to preclude application of the 2-year-absence requirement to any exchange visitor who, subsequent to the enactment of the present bill, may apply for an extension of the period of time for which he was admitted.

Petitioner urges for the first time in this Court that the expressed intention not to "preclude application of the 2-year-absence requirement" is to be interpreted as merely permissive and "cautionary".[7] In view of the overall purpose of the amendment to prevent the very evil which this case exemplifies, as forcefully expressed both in committee report and in debate, the committee's words can only be understood as meaning that the proviso was not intended to prevent, stop, hinder, or impede the application of the two-year provision to exchange visitors who thereafter applied for an extension.

3. Petitioner's ambiguous claim that he had somehow acquired, before June 1956, a more or less permanent status which was subject to extension is plainly contrary to the express language of the only document upon which such a claim could be based. Following the hearing of June 8, 1954, on petitioner's application for change of status, he was notified that his application was granted and that there was being returned his Form I-94 "which has been executed to

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[7] Petitioner's contention in the court of appeals was that the language of the statute was so unambiguous that no occasion existed for examining its legislative history.

show your present status in the United States and your admission until June 15, 1955". *Supra*, p. 8. That was the only benefit and status conferred at that time. The later extension in 1956, after the two-year absence requirement was imposed, was granted only after this condition was carefully explained and petitioner acknowledged in writing his acceptance thereof (*supra*, pp. 9-10). There was nothing retroactive in such acceptance; it was prospective only, covering any future extension. That petitioner fully understood the conditions of his presence in this country is further shown by his letter asking for waiver of the two-year absence provision, in which he acknowledged that if his request was denied he would have to leave this country for a period of two years (*supra*, p. 10).

4. Petitioner also contends that the Immigration and Naturalization Service gave him erroneous advice in telling him that a change in his status would be necessary before he could accept an internship in Port Chester (*supra*, p. 8). Other than by making the general assertion that there were three other alternatives available, none of which is specified, petitioner does not intimate in what respect this advice was in error. It appears to have been entirely sound, as petitioner, who was admitted as a nonimmigrant student to complete a four-year course of study at the Dallas Theological Seminary, obviously could not accept an internship in New York without a modification of his status. In no way was the change urged upon him; it was made to accommodate him upon his own request.

5. Finally, it should be pointed out that petitioner does not claim to come within the terms of the first proviso to Section 201, *supra*, p. 6 (Pet. 15). In this connection it should be noted that there was no finding by the Attorney General that petitioner is a person "whose services are needed urgently in the United States because of (his) high education, technical training, specialized experience or exceptional ability", as asserted by petitioner (Pet. 8). The approval of the request of the Hibbing General Hospital to grant petitioner a first preference status, as far as his country's immigration quota was concerned, had nothing to do with his eligibility for adjustment of status while remaining in this country—as the Service was at pains to point out repeatedly during the course of the correspondence (*supra*, pp. 12-13). In view of the terms upon which his government consented to his sojourn here, good faith on the part of both petitioner and respondent requires that those terms be observed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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